

ORIGINAL

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

AUG 19 1996

Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
Amendment to the Commission's )  
Rules Regarding a Plan for Sharing )  
the Costs of Microwave Relocation )

WT Docket No. 95-157

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

To: The Commission

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REPLY  
OF THE  
AMERICAN PETROLEUM INSTITUTE  
TO OPPOSITIONS TO ITS  
PETITION FOR RECONSIDERATION

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits this Reply to Oppositions to its Petition for Reconsideration of rule amendments covered by the First Report and Order ("Order") and adopted by the Commission in this matter on April 25, 1996.<sup>1/</sup>

REPLY

1. In its Petition for Reconsideration ("Petition"), API requested the Commission to fine-tune certain aspects of

<sup>1/</sup> 61 Fed. Reg. 29679 (June 12, 1996).

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its 2 GHz microwave relocation framework so that the rules will work in a more equitable and efficient manner. To this end, API demonstrated that several of the provisions adopted by the Commission in its Order fail to make microwave incumbents "whole" in connection with their transition to alternate spectrum and threaten to impede, rather than facilitate, the relocation process. As shown below, the Oppositions filed in response to API's Petition do not adequately refute any of API's basic contentions.

**A. The Amended Rules Do Not Guarantee "Comparable Facilities"**

2. In its Petition, API objected to the Commission's definition of "communications throughput" as the amount of information transferred within the system in a given amount of time, as determined at the time of relocation. Emphasizing that many incumbents have designed their systems in accordance with future expansion plans, API pointed out that replacement systems may become obsolete before installed if they do not have adequate reserve capacity. Accordingly, API urged the Commission to redefine "communications throughput" with reference to the capacity of the incumbent system.

3. A number of other incumbent entities echoed API's concerns in their respective Petitions for Reconsideration. Small Business in Telecommunications ("SBT"), for example, correctly noted that, because many microwave systems are highly subject to seasonal loading factors, "[i]t would be manifestly unfair to allow a PCS licensee to impair the throughput capacity of a microwave system to less than the peak need which the microwave licensee can reasonably expect."<sup>2/</sup> Similarly, The Telecommunications Association ("UTC") explained that many utilities and pipelines design their microwave systems with sufficient capacity to accommodate expected traffic growth and therefore need replacement facilities with comparable capacity.<sup>3/</sup>

4. PCS providers essentially argue in response that the Commission's "throughput" definition will promote spectrum efficiency by discouraging spectrum warehousing.<sup>4/</sup> While API agrees that the Commission's rules should foster spectrum efficiency, API does not believe it is inefficient for licensees to invest in and reserve some amount of excess

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<sup>2/</sup> SBT's Petition for Reconsideration at 3.

<sup>3/</sup> UTC's Petition for Reconsideration/Clarification at 3.

<sup>4/</sup> See, e.g., Opposition of Pacific Bell Mobile Services ("Pac Bell") at 5-6; Opposition of the Personal Communications Industry Association ("PCIA") at 7-8.

capacity to allow for expansion pursuant to their clearly defined business plans. Simply stated, the existing "throughput" rule ignores operational and commercial realities and would, in many instances, fail to provide microwave incumbents with the comparable replacement facilities that the Commission's relocation framework was meant to guarantee.

**B. Microwave Incumbents Should Be Entitled to Reimbursement for All Reasonable and Documented Transaction Expenses**

5. The Commission's amended rules place a cap on reimbursable consultants' and attorneys' fees of two percent of the total "hard" costs involved and preclude recovery during an involuntary relocation of transaction expenses incurred by incumbents during the voluntary and mandatory negotiation periods. API argued in its Petition that engineering consultants and transactional legal fees might reasonably exceed \$10,000 per link, particularly in urban areas; thus, the two percent cap could result in a shortfall for some incumbents in the reimbursement of their reasonable transaction costs. API also urged the Commission to permit reimbursement during an involuntary relocation of an incumbent's reasonable transaction costs incurred prior to the involuntary period. Otherwise, API explained, the

Commission would be laying the blame and cost for the failure to reach an agreement squarely upon the incumbent.

6. PCS interests claim that the two percent cap will help prevent incumbents from making a profit through relocation and will avert disputes over which transaction costs are reimbursable.<sup>5/</sup> This argument is not only unpersuasive, but also wholly inconsistent with the underlying goals of the Commission's relocation rules. To begin with, the right to be reimbursed for all reasonable and clearly documented transaction costs incurred as a direct result of the Commission's spectrum reallocation plan would hardly present incumbents with a profit-making opportunity. Rather, full reimbursement of transaction costs is necessary merely to maintain the status quo. Furthermore, the potential for some degree of abuse or uncertainty does not justify the imposition of an arbitrary cap and the corresponding denial to some incumbents of full reimbursement for legitimate expenses. As with other aspects of the Commission's relocation rules, any alleged abuses can be addressed through the Commission's dispute resolution procedures.

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<sup>5/</sup> See Opposition of AT&T Wireless Services, Inc. ("AT&T") at 7; Pac Bell Opposition at 3; PCIA Opposition at 6.

7. With respect to the Commission's preclusion of recovery once an involuntary relocation has commenced for transaction costs incurred during the voluntary and mandatory negotiation periods, AT&T glibly proclaims that this "might be the only provision in the Commission's rules that gives microwave licensees an incentive to relocate voluntarily."<sup>6/</sup> Contrary to AT&T's suggestion, there are, in fact, numerous provisions that promote voluntary relocations.<sup>7/</sup> Somewhat ironically, however, the above-noted preclusion of transaction cost recovery is not one of them. Indeed, the prospect that their transaction costs may not ultimately be reimbursed could actually discourage some incumbents from embarking upon voluntary negotiations or cause them to abandon ongoing negotiations at the first sign of any obstacles. API respectfully urges the Commission not to allow the misguided concerns of certain PCS licensees to result in the adoption of rules such as this which undermine the basic principles of the Commission's relocation framework.

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<sup>6/</sup> AT&T Opposition at 7.

<sup>7/</sup> Such provisions include, for example, the Commission's cost-sharing plan and the right of microwave incumbents to request and receive premiums (such as digital upgrades) during the voluntary period.

**C. The Commission's Sunset Provision is Unwarranted**

8. API's Petition challenged the Commission's decision to "sunset" reimbursement rights on April 4, 2005. Certain PCS interests argue in their Oppositions that the sunset rule is appropriate because it provides incumbents with an incentive to negotiate and relocate more quickly.<sup>8/</sup> This argument ignores the fact that some microwave incumbents may never even have the opportunity to negotiate a relocation agreement prior to 2005 because PCS licensees -- particularly in later years and in rural areas -- simply may wait until after the sunset to deploy their systems. Punishing incumbents in such instances by requiring them to pay for their own relocations would be not only unfair, but also inefficient. Spectrum efficiency would instead be maximized by allowing incumbents to continue operations in the 2 GHz band, without fear of adverse consequences, at least until the time that particular PCS licensees are prepared to make use of that spectrum.

9. Moreover, Omnipoint's assertion that elimination of the sunset provision would enable microwave incumbents

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<sup>8/</sup> See Opposition of Omnipoint Communications, Inc. ("Omnipoint") at 2; PCIA Opposition at 5.

"to stall and demand exorbitant premiums in perpetuity"<sup>9/</sup> is pure hyperbole. As Omnipoint no doubt is aware, the Commission's relocation rules allow PCS licensees to relocate non-public safety microwave incumbents involuntarily to comparable facilities after only three years, without the benefit of any premiums. Because the potential to achieve a quick relocation and prompt PCS deployment will rest squarely within the control of PCS licensees from that time on, there is absolutely no reason to seek to alter the behavior of microwave incumbents through imposition of the sunset provision.

**D. The Commission Should Reject the Improper Attempts of PCS Licensees to Rewrite the Basic Relocation Framework at This Time**

10. In their Oppositions, several PCS licensees persist in their untimely and unfounded efforts to drastically alter the Commission's relocation framework and to deprive microwave incumbents of the basic protections that the relocation rules are intended to guarantee. These PCS licensees contend that microwave incumbents should be required either to vacate the 2 GHz band at the end of the

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<sup>9/</sup> Omnipoint Opposition at 2.



mandatory negotiation period or to have their licenses automatically amended to secondary status at that time.<sup>10/</sup>

11. The Commission's Rules provide that the Commission will amend the license of a microwave incumbent to secondary status only if the PCS licensee satisfies certain requirements, including the building and testing of a replacement system and the guarantee of payment of all relocation costs. Incredibly, PCIA characterizes as simply a "clarification"<sup>11/</sup> what is in reality a proposal by PCS licensees to bring about wholesale revisions to the relocation framework. As API pointed out in its Opposition, this framework was adopted by the Commission after ample opportunity for input from all interested parties. The attempt of PCS licensees to upset the delicate balance achieved by the Commission rests upon nothing more than pure speculation. Moreover, because this issue was never adequately raised in this proceeding, it is not the proper subject of a Petition for Reconsideration. Thus, amendment of the rules in the manner suggested by these PCS interests would subvert the rule making process and threaten the Commission's credibility.

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<sup>10/</sup> AT&T Opposition at 5; Pac Bell Opposition at 1-2; PCIA Opposition at 9-10.

<sup>11/</sup> PCIA Opposition at 9.

**WHEREFORE, THE PREMISES CONSIDERED,** the American Petroleum Institute respectfully submits the foregoing Reply and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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Dated: August 19, 1996

CERTIFICATE OF SERVICE

I, Patt Meyer, a secretary in the law firm of Keller and Heckman LLP, do hereby certify that a copy of the foregoing REPLY OF THE AMERICAN PETROLEUM INSTITUTE TO OPPOSITION TO ITS PETITION FOR RECONSIDERATION was served this 19th day of August, 1996 by mailing U.S. First-Class, postage prepaid, to the following:

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